STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 2, 2005
v	No. 252524 Oakland Circuit Court
RONNIE PRATT MONCRIEF, JR., Defendant-Appellee.	LC No. 03-007909-AR

Before: Cooper, P.J., and Fort Hood and Gribbs*, JJ.

PER CURIAM.

Plaintiff Oakland County Prosecutor appeals by delayed leave granted from an order affirming the district court's dismissal of a charge of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), against defendant Ronnie Pratt Moncrief, Jr. The dismissal occurred after a combined preliminary examination/evidentiary hearing on defendant's motion to suppress evidence obtained in a warrantless search of his car. We reverse.

Officer Shawn Werner testified that on the evening of October 23, 2002, he and his partner were on road patrol in the area of Sanford and Lois Streets after receiving a report of narcotics trafficking coming from 47 North Sanford. While driving down Sanford, Werner saw defendant get out of a Chevy Lumina parked in a lot behind 47 North Sanford and walk up to the house. Werner noticed that defendant was staring at the police car as he walked. Werner drove around the block and ran the license plate of the car, which was registered to a man named Wayne Grandison whom Werner knew "from previous cocaine arrests." When the officers got back to the corner of Sanford and Lois, defendant was sitting in the car alone. The officers approached the car to talk to defendant, who got out of the car and shut and locked the door behind himself.

The officers asked defendant who he was and why he was there. Defendant responded that he lived there, but did not have a key, so he was waiting for his sister to arrive. When defendant gave the officers his name, Werner recognized it as that of a prior drug offender. Defendant consented to a search of his person, which revealed $88 and a cell phone that rang three times while the officers were there. Werner asked if he could search the car, but defendant refused. Werner testified that the officers then called for a dog to perform a drug sniff around the car based on "the complaints of drug sales, knowing him, having prior cocaine convictions, his locking the door when he got out, letting us search his person, but not the car."

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

A canine-handling officer and a dog came to the scene. Werner "observed the dog jump up on all fours on the driver window twice, at least . . . ." When defendant refused Werner's request for the car keys, Werner called for a wrecker. Once the car was opened, Werner searched it and discovered two "corner ties" of suspected cocaine under the seats, a picture of defendant and his daughter, a medical bill in defendant's name, and "a lot of men's clothing." At no time before his arrest did defendant attempt to leave or ask to do so.

Defendant filed a motion to suppress the evidence obtained from the car. The prosecutor argued that this was a consensual encounter between the police and defendant, who was not under arrest and did not try to leave. The prosecutor noted that the officers were suspicious because the car was registered to a known drug offender, and that when the police dog alerted at the car, that created probable cause to search. The prosecutor argued that because the car was parked and unoccupied, the officers were permitted to have the dog sniff the car. The district court granted defendant's motion to suppress, noting that officers were not authorized to ride through a neighborhood with lists of people who had committed crimes or were on parole and pursue those individuals based on that "prejudicial information that is not relevant." The district court then dismissed the case without hearing further argument.

The prosecutor appealed to the circuit court, arguing that the police had a reasonable, articulable basis for suspecting that criminal activity was afoot.[1] That was a sufficient basis for having a drug dog sniff the car, and when the dog alerted, that provided probable cause to search the car. Defendant responded that the dog's alert could provide probable cause only if its search was conducted pursuant to an exception to the warrant requirement, such as a search incident to a valid arrest or a search with defendant's consent. Because defendant was not under arrest and had not consented to search of the car, defendant argued, the search was illegal.

The circuit court noted that the police could search the car without a warrant if they had probable cause to believe it contained contraband or other evidence of a crime, and stated that a canine alert could establish that probable cause existed. The circuit court further noted that if the use of a dog was the result of the officers' illegal conduct, the resulting evidence must be suppressed. The circuit court concluded that, on the basis of the preliminary examination testimony, the officers "lacked probable cause to search the vehicle without a warrant." After finding that defendant had standing to challenge the search, the circuit court affirmed the district court's decision. The prosecutor sought delayed leave to appeal the trial court's order, and we granted the application.

We review a trial court's factual findings at a suppression hearing for clear error, but review de novo the ultimate ruling on a motion to suppress. *People v Marcus Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). We review the trial court's decision whether to bind a defendant over for trial for an abuse of discretion. *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997).

[1] The prosecutor also raised the argument that defendant did not have standing to challenge the search; however, the prosecutor has not pursued that argument before this Court.

The prosecutor argues that the lower courts erred in suppressing the evidence, because the warrantless search was supported by probable cause. We agree. "The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). Defendant states, without citation to authority, that the officers were required to have reasonable suspicion that he was engaged in criminal activity before allowing a dog to sniff his car. However, this is not an accurate statement of the law. The officers' use of a drug-sniffing dog on defendant's publicly-parked car does not raise Fourth Amendment concerns because, in light of the fact that use of a dog will not disclose non-contraband items in which the owner might have a privacy interest, it is not considered a search. See *Illinois v Caballes*, ___ US ___; 125 S Ct 834, 837-838; 160 L Ed 2d 842 (2005); *United States v Place*, 462 US 696, 707; 103 S Ct 2637; 77 L Ed 2d 110 (1983). See also *People v Tate*, 134 Mich App 682, 688-690; 352 NW2d 297 (1984) (no reasonable expectation of privacy for car parked in private driveway). Therefore, the question at issue is whether the officers' subsequent warrantless search of the car violated defendant's Fourth Amendment rights.

Generally, to satisfy the Fourth Amendment's requirement that a search be reasonable, law enforcement authorities must first obtain a warrant. See *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). However, there are various well-established exceptions to the warrant requirement. The burden of proof is on the prosecutor to show that one of these exceptions was met. See *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003). Defendant points out that two of these exceptions were not applicable, specifically, the exceptions for consent and for a search incident to arrest. However, this observation is irrelevant because the search was conducted pursuant to the automobile exception, which allows officers to conduct a warrantless search of a vehicle if they have probable cause to believe it contains contraband. See *Pennsylvania v Labron*, 518 US 938, 940; 116 S Ct 2485; 135 L Ed 2d 1031 (1996); *California v Carney*, 471 US 386, 390-391; 105 S Ct 2066, 2068-2069; 85 L Ed 2d 406 (1985).

In this case, the officer's testimony indicated that the dog jumped up repeatedly on the driver's side of the car. "A positive indication by a properly trained dog is sufficient to establish probable cause for the presence of a controlled substance." *United States v Diaz*, 25 F3d 392, 393-394 (CA 6, 1994); see also *People v Clark*, 220 Mich App 240, 242-243; 559 NW2d 78 (1996). Therefore, we conclude that the officers had probable cause to conduct a warrantless search of defendant's car.[2]

[2] We note that "[f]or a positive dog reaction to support a determination of probable cause, the training and reliability of the dog must be established." *Diaz*, *supra* at 394; see also *Clark*, *supra* at 244. In this case, there was no evidence on the record regarding the dog's training or reliability. However, our review of the record indicates that defense counsel rejected the prosecutor's offer to present a witness who would testify about the dog's abilities. Therefore, any error arising from the prosecutor's failure to present such evidence was extinguished. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

The circuit court's rationale in determining that the search was unlawful is not entirely clear, but we surmise that it based its decision on its observation that, under *Clark*, evidence obtained through a canine search must be suppressed if "the use of the dog is itself the result of illegal conduct by the officers." *Clark*, *supra* at 243, citing *United States v Buchanon*, 72 F3d 1217, 1226 (CA 6, 1995). While this is an accurate statement of the law, there was no evidence on the record that the officers behaved unlawfully. It is undisputed that defendant was not detained or arrested before the search took place, nor was the car itself seized. "When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005). The Fourth Amendment is not implicated until the officer interferes with the defendant's attempt to leave, at which time the officer must have reasonable suspicion to make an investigatory stop. *Id*. at 34. Furthermore, as noted, the officers' initial use of the drug-sniffing dog was not a "search" for Fourth Amendment purposes. Therefore, we conclude that the circuit court erred in concluding that the evidence must be suppressed.

We further conclude that the circuit court abused its discretion in affirming the dismissal of the charge against defendant. At a preliminary examination, the prosecutor must establish probable cause to believe that a crime was committed and probable cause to believe that the defendant committed it. See *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). The proofs must be sufficient to cause a cautious individual to reasonably believe that the defendant is guilty as charged. See *People v Justice (After Remand)*, 454 Mich 334, 343; 562 NW2d 652 (1997). If probable cause is established, the magistrate must bind the defendant over for trial. See MCL 766.13; *People v Maynor*, 256 Mich App 238, 243; 662 NW2d 468 (2003). Here, the prosecutor presented evidence that defendant had approximately fourteen grams of cocaine in his car, stored in two separate bags. This evidence was sufficient to establish probable cause to believe that defendant was guilty of possession with intent to deliver less than fifty grams of cocaine. Accordingly, the circuit court abused its discretion in dismissing the charge.

Reversed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs